

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TINA MARIE PADZIORA,

Defendant and Appellant.

E047575

(Super.Ct.Nos. FSB05839 &
FSB023887)

OPINION

APPEAL from the Superior Court of San Bernardino County. Colin J. Bilash,
Judge. Reversed with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and
Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Tina Marie Padziora¹ pled no contest to one count of welfare/food stamp fraud. (Welf. & Inst. Code, § 10980, subd. (c)(2).) A trial court suspended imposition of sentence and granted her supervised probation for five years on the conditions that she, among other things, serve time in county jail and pay restitution to Aid to Families with Dependent Children (AFDC) and to the food stamp program. After having her probation revoked and reinstated numerous times for failure to pay, the court eventually revoked her probation and sentenced her to two years in prison.

On appeal, defendant contends that 1) the trial court abused its discretion when it sentenced her to state prison instead of reinstating her probation, and 2) the court improperly converted the outstanding restitution balance to a civil judgment. We reverse the revocation order and remand the matter for the trial court to make a finding on defendant's ability to pay restitution.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 1995, defendant pled no contest to one count of welfare/food stamp fraud. (Welf. & Inst. Code, § 10980, subd. (c)(2).) On November 28, 1995, the trial court granted probation for five years, under certain conditions, including that defendant serve 180 days in county jail and pay \$9,505 in restitution to AFDC and \$996 to the food stamp program. She subsequently served her time in jail on weekends until she was injured in a fall on May 5, 1996. She had served 47 days up to the time of her injury.

¹ Defendant is also referred to in the record as Christine Renee Padziora.

On September 9, 1996, defendant informed the probation department that her doctor had given her medical clearance to return to work. She was also ready to resume serving her jail time. The probation officer recommended that her probation be modified to require her to serve 180 days in county jail, with credit of 47 days for time served, with the balance to be served in consecutive 96-hour periods commencing on October 21, 1996. The court ordered the probation conditions modified as recommended.

On August 12, 1998, the probation department filed a petition to revoke defendant's probation, alleging that defendant violated her probation by failing to pay restitution. Specifically, the petition stated defendant still owed a balance of \$9,405 on the AFDC account. The court revoked probation on August 20, 1998. Defendant appeared in court on September 15, 1998, and the matter was continued for a supplemental report to be produced. According to the probation report dated October 5, 1998, defendant had an updated AFDC balance of \$9,105. She had had a variety of financial and personal problems. Defendant stated she would now begin making large payments regularly. The probation officer recommended that the term requiring payment of restitution be modified to require her to pay the balance owed at the rate of \$455 per month. The court reinstated defendant's probation and modified the probation condition accordingly.

On April 8, 1999, the probation department reported that defendant had not made any payments since her last court appearance. The court ordered probation revoked again. The matter was continued. Defendant was interviewed on September 30, 1999,

and said that she and her husband had every intention of paying the restitution, but problems, including a home invasion robbery, prevented them from doing so. At a hearing on November 17, 1999, defendant admitted the violation of probation. The court reinstated her probation, but modified the terms to include that defendant serve 90 days in county jail, with credit for time served of 72 days.

On October 6, 2000, the probation officer filed another petition to revoke probation, alleging that defendant still owed \$9,105 on the AFDC account and \$981 on the food stamp account. The probation officer reported that defendant said she had not had a paying job since 1993. The codefendant, her husband, worked from 1993 to 1999 and had a take home pay of \$1,300 per month. Defendant said she and her husband did not make any restitution payments between 1997 and 1999 ““due to stupidity.”” Then, from September 1999 to March 2000 she was in jail on various charges, and her husband was in and out of jail from September 1999 to June 2000. The probation officer stated defendant had been on probation for over five years and had made only two restitution payments totaling \$275. The probation officer concluded she had been given every opportunity on probation, yet continued to fail, thus, state prison was appropriate.

After several continuances, a hearing was held on April 17, 2001. Defendant admitted violating her probation. The court reinstated her probation. Her probation was extended to expire on April 17, 2003.

In a compliance memo dated January 14, 2004, the probation officer reported that defendant had serious health problems related to a workers’ compensation injury she

received two years prior. She just had her third surgery due to nerve damage in her leg, and she was going to have surgery on her ankle. Defendant planned on paying off the balance of the restitution owed, as soon as her workers' compensation case settled.

In a probation memo dated January 20, 2005, defendant reported that her workers' compensation case was still open. She was recently examined by a workers' compensation doctor, who determined that she was 100 percent disabled. Her husband had not had regular work. According to defendant, they subsisted on her workers' compensation income of \$504 per month, plus his income of \$300 to \$400 per month. Defendant still intended on paying off the restitution balance, which was \$8,970, plus a collection fee of \$905.50, with her workers' compensation settlement money.

In a probation memo dated March 8, 2006, the probation officer reported that defendant was interviewed and she said it was her understanding that all restitution had been paid in full. She thought she paid over \$6,000 from her workers' compensation settlement. The probation officer called Central Collections and learned that defendant made payments on accounts that had to do with such issues as electronic monitoring in the instant case, and fees on another one of her cases. Defendant was very upset and cried when she learned the money she paid went to the wrong accounts. Defendant was still disabled and could not work. According to Bill Chapel of Central Collections, defendant made payments in October 2005, but she should have made payments on victim's restitution to the Human Services System. He said there was nothing that could be done to fix the situation.

A probation review hearing was held on March 9, 2006, and the court struck several of defendant's conditions and modified the restitution condition to require her to pay restitution in the amount of \$9,505 through Human Services System Auditing at the rate of \$20 per month. One year later, a probation review hearing was held, and the court ordered probation to continue on the same terms and conditions.

On August 8, 2008, the probation officer filed a supplemental report (dated July 24, 2008), reporting that a warrant was issued on March 14, 2008, based on a revocation of probation for failure to pay restitution. Defendant was interviewed and said again that she had paid a significant amount of money on the restitution, and she believed a "deal" had been struck which relieved her of paying the remaining amount. The probation officer further reported that defendant was disabled and not working, and that she and her husband were basically homeless, living in motels and with friends. The social worker opined that defendant was apparently confused about what had transpired, which was possibly why she stopped making payments. The probation officer summarized that defendant had been on probation since 1995, had served well over three years in county jail for various violations, had committed no new crimes, and was not a danger to the community. Since defendant's only issue was that she had not paid the remaining balance of \$7,562.10, the probation officer recommended that probation be terminated and the amount owed be collected through a civil judgment.

At a probation revocation hearing on August 8, 2008, the prosecutor informed the court that he and defendant had reached an agreement that defendant's probation would

be extended five years and she would pay the remaining balance of restitution owed within that time. Defendant confirmed the agreement and admitted being in violation for failure to pay her restitution. The court revoked, reinstated, and extended defendant's probation until August 8, 2013. Defendant was ordered to pay off her balance of \$7,562.10 at a rate of \$200 per month.

A probation review hearing was held on December 1, 2008. The People informed the court that defendant had not made any payments since the last court date. Defense counsel stated that defendant maintained she was disabled with no income, she had paid the amounts owed, and her probation condition requiring her to pay restitution was stricken. Thus, defendant did not feel she had to pay. The court stated that the condition was not stricken, defendant admitted her probation violation for failure to pay, and the court gave her an opportunity by reinstating probation and had ordered her to pay \$200 per month. The court found that defendant had violated her probation by a willful failure to pay, ordered her remanded into custody, and referred the matter to the probation department for recommendation.

The probation officer filed a supplemental report on December 23, 2008, and reported that defendant was interviewed on December 16, 2008, over the telephone since she was being housed at the Glen Helen Rehabilitation Center. Defendant said she paid over \$6,000 in victim restitution in October 2005 and that Central Collections misapplied the funds to other accounts. She said that Mr. Chapel of Central Collections told her there was nothing they could do to fix the problem. The probation officer stated that

since defendant was currently disabled, unemployed, and did not have a steady source of income, it appeared she did not comply with her probation due to her inability to pay, not for willful disregard to make the victim whole. Thus, the probation officer recommended that defendant's probation be terminated and the amount owed be collected through a civil judgment.

A hearing regarding the supplemental report was held on December 23, 2008. Defense counsel asked defendant if she admitted that her probation conditions still required her to pay restitution. Defendant said yes. She then admitted she had not paid all the restitution, and that she had violated her probation. All parties joined in the admission. The court stated it felt that the probation department's recommendation was inappropriate. It then revoked defendant's probation and asked if there was any legal cause not to sentence her, and whether either side wished to be heard. Defendant proceeded to ask the court questions regarding whether she and her husband both owed the restitution money. The court then revoked defendant's probation and committed her to the California Department of Corrections and Rehabilitation for the middle term of two years. The court gave her custody credits in the amount of 617 actual days, plus 308 conduct credits, for a total of 925 days. Because defendant's credits exceeded the amount of time she was obligated to serve, the court directed her to report to the parole office as soon as possible. The court also stated: "All previous findings and fees remain in full force and effect. The restitution amount will be converted to a civil judgment."

ANALYSIS

The Trial Court Improperly Revoked Defendant's Probation

Defendant argues the trial court abused its discretion when it sentenced her to state prison instead of reinstating her probation. We agree to the extent that the court failed to make a finding on her ability to pay.

“A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner. [Citations.]” (*People v. Delson* (1984) 161 Cal.App.3d 56, 62.)

At the outset, the People argue defendant waived the issue on appeal by failing to object at the time of sentencing. A defendant's failure to object to discretionary sentencing choices forfeits any claim of error on appeal, provided he or she had a meaningful opportunity to object at the time of sentencing. (*People v. Zuniga* (1996) 46 Cal.App.4th 81, 84.) The record shows that, prior to imposing the sentence in this case, the court stated it disagreed with the probation department's recommendation. It revoked defendant's probation and asked if there was any legal cause not to sentence her. Defendant proceeded to ask the court questions regarding her husband's liability for the restitution owed. The court then sentenced defendant, and there was no objection. Thus, the record reveals that at the time her probation was revoked, defendant was in court with counsel, was given the opportunity to address the court on the sentencing issue, heard the

court pronounce sentence, and voiced no objections. Defendant was provided a meaningful opportunity to state her case for reinstating probation.

However, defendant argues her counsel was ineffective for failing to object. We agree. To establish ineffective representation, a defendant must show that her counsel's performance was deficient, and that there was a reasonable probability that a more favorable outcome would have resulted absent counsel's failings. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) Here, given the evidence that defendant was disabled and had no ability to pay at the time her probation was revoked, she was prejudiced by her counsel's failure to object. (See *post.*)

Penal Code section 1203.2, subdivision (a) provides, in relevant part, that "probation shall not be revoked for failure of a person to make restitution pursuant to Section 1203.04 as a condition of probation unless the court determines that the defendant has willfully failed to pay and has the ability to pay. Restitution shall be consistent with a person's ability to pay."

At the probation review hearing on December 1, 2008, the court found defendant had violated her probation by a willful failure to pay. Defendant tried to speak to the court, but the court refused to listen. It then ordered her remanded into custody, and referred the matter to the probation department for recommendation. The probation officer reported that defendant was "currently disabled, unemployed, and [did] not have a steady source of income at [that] time." The probation officer concluded that defendant

apparently had not complied with her probation condition to pay restitution “due to her inability to pay and not for willful disregard to make the victim whole.”

At the hearing on December 23, 2008, the court simply stated it felt the probation department’s recommendation was “inappropriate” and then revoked defendant’s probation. The court had determined, at the prior hearing, that defendant willfully failed to pay. However, the court did not make a finding that defendant had the ability to pay, as required by Penal Code section 1203.2, subdivision (a).

Although the evidence showed defendant previously had the ability to pay, but failed to do so, the court delayed revoking probation and imposing sentence at those times. Moreover, the court’s decision to revoke defendant’s probation and impose sentence was based on her *current* violation of the term requiring her to pay the remaining balance of \$7,562.10, at \$200 per month, beginning on October 10, 2008. We further note the only apparent evidence regarding defendant’s ability to pay, at the time the court revoked defendant’s probation, showed she was disabled and unemployed.

Since the court failed to make the required determination regarding defendant’s current ability to pay restitution, prior to revoking her probation, we reverse the revocation order and remand the matter for the court to make a determination of her ability to pay. (Pen. Code, § 1203.2, subd. (a).)

As to defendant’s contention the court improperly converted the outstanding balance on the restitution order to a civil judgment, after revoking her probation, we simply note that any portion of a restitution order that remains unsatisfied after a

defendant is no longer on probation or parole shall continue to be enforceable by a victim “as if the restitution order were a civil judgment.” (Pen. Code, §§ 1214, subd. (b), 1202.4, subd. (m).) Thus, it is unnecessary for a court to “convert” restitution orders to civil judgments.

DISPOSITION

We reverse the probation revocation order and remand the matter to the trial court to allow it to make a determination on defendant’s ability to pay restitution.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.